STATE OF MICHIGAN

IN THE SUPREME COURT

COUNTY OF WAYNE,
Plaintiff-Appellee,

-vs-

EDWARD HATHCOCK,
Defendant-Appellant.
_____/

Supreme Court No. 124070
Court of Appeals No. 239438
Wayne CC No. 01-113583-CC

COUNTY OF WAYNE,
Plaintiff-Appellee,

-vs-

AARON T. SPECK and DONALD E. SPECK,
Defendants-Appellants.
_____/

Supreme Court No. 124071
Court of Appeals No. 239563
Wayne CC No. 01-114120-CC

COUNTY OF WAYNE,
Plaintiff-Appellee,

-vs-

AUBUNS SERVICE, INC. and DAVID R. YORK
Trustee of the DAVID R. YORK
REVOCABLE LIVING TRUST,
Defendants-Appellants.
_____/

Supreme Court No. 124072
Court of Appeals No. 240184
Wayne CC No. 01-113584-CC

COUNTY OF WAYNE,
Plaintiff-Appellee,

-vs-

JEFFREY J. KOMISAR,
Defendant-Appellant.
_____/

Supreme Court No. 124073
Court of Appeals No. 240187
Wayne CC No. 01-113587-CC

BRIEF AMICUS CURIAE OF THE PUBLIC CORPORATION LAW SECTION OF THE STATE BAR OF MICHIGAN

COUNTY OF WAYNE,
Plaintiff-Appellee,

-vs-

ROBERT WARD and LELA WARD,
Defendants-Appellants.
and
HENRY Y. COOLEY,
Defendant.
_____/

Supreme Court No. 124074
Court of Appeals No. 240189
Wayne CC No. 01-114113-CC

COUNTY OF WAYNE,
Plaintiff-Appellee,

-vs-

MRS. JAMES GRIZZLE and MICHELLE A. BALDWIN,
Defendants-Appellants.
and
RAMI FAKHOURY,
Defendant.
_____/

Supreme Court No. 124075
Court of Appeals No. 240190
Wayne CC No. 01-114115-CC

COUNTY OF WAYNE,
Plaintiff-Appellee,

-vs-

STEPHANIE A. KOMISAR,
Defendant-Appellant.
_____/

Supreme Court No. 124076
Court of Appeals No. 240193
Wayne CC No. 01-114122-CC

COUNTY OF WAYNE,
Plaintiff-Appellee,

-vs-

THOMAS L .GOFF, NORMA GOFF, MARK A. BARKER, JR., and KATHLEEN A. BARKER,
Defendants-Appellants.
_____/

Supreme Court No. 124077
Court of Appeals No. 240194
Wayne CC No. 01-114123-CC

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NOTICE

This brief is filed on behalf of the Public Corporation Section only. It does not reflect the views or opinions of the State Bar of Michigan, and has not been authorized by the State Bar of Michigan.

STATEMENT OF JURISDICTION

The Public Corporation Section does not contest the Court's jurisdiction.

STATEMENT OF QUESTIONS INVOLVED

I. DOES THE COUNTY HAVE THE AUTHORITY TO TAKE DEFENDANTS' PROPERTY IF IT IS BEING TAKEN FOR A PUBLIC USE?

The Trial Court says "yes."
Plaintiff says "yes."
Defendant says "no."
Amicus says "yes."
This Court should say "yes."

II. IF POLETOWN IS REVERSED OR RESTATED, SHOULD THE COURT'S OPINION CLEARLY CONFIRM THE VALIDITY AND SCOPE OF THE EMINENT DOMAIN AUTHORITY AS TO TYPICAL PUBLIC IMPROVEMENTS AND BLIGHT OR NUISANCE REMOVAL?

The Trial Court: not applicable.
Plaintiff says "yes."
Defendant says "no."
Amicus says "yes."
This Court should say "yes."

III. IF THE COURT OVERTURNS POLETOWN, SHOULD ITS DECISION BE PROSPECTIVE?

The Trial Court: not applicable.
Plaintiff says "yes."
Defendant says "no."
Amicus says "yes."
This Court should say "yes."

INTRODUCTION

This Court is reconsidering its 1981 opinion in Poletown v City of Detroit, 410 Mich 616; 304 NW2d 455 (1981), one of the most controversial decisions in Michigan jurisprudence, and arguably one of the more significant decisions in the nation on the subject of eminent domain in the 50 years since Berman v Parker, 348 US 26; 75 S Ct 98; 99 L Ed 27 (1954). In Berman, the U.S. Supreme Court considered the purposes for which private land may be condemned for "public use" by a governmental agency under the federal constitution, and broadly defined that term, in the context of an "urban renewal" project, to include the general concept of public advantage or public benefit. Relying in part on Berman's expansive language, Poletown authorized the condemnation of an entire neighborhood of Detroit homes and businesses to allow the underlying real estate to be conveyed to the General Motors Corporation to build an auto plant. The decision remains the "high-water mark" for the liberal construction of the public use requirement.

Now nearly a quarter-century old, Poletown has recently become something of a lightning rod in the current national debate over what some have termed eminent domain "abuse." Critics on both sides of the political/social spectrum have aligned in questioning whether the eminent domain authority has been too often used to further ***private*** economic gain rather than to secure clear or significant ***public*** benefits.

In this very case, the American Civil Liberties Union (ACLU) and the Pacific Legal Foundation (PLF), two groups with seemingly little else in common, have joined forces in an *amicus* brief in support of the individual defendants whose properties are proposed to be taken for an office park development by Wayne County. Ralph Nader recently published a law review article critical of the use of eminent domain for the benefit of casinos, shopping malls, and the like; the article could

easily have been written by the Mackinac Center.[1] Even the Court of Appeals panel below, which upheld the office park taking at issue under a Poletown-like economic development analysis, was openly unhappy about its decision.

Against this backdrop, and in light of the clear message in this Court's order granting leave to appeal that the Poletown test is open for reconsideration, it would be irresponsible to simply reassert the general principles and authorities in the case (still consistent, it should be noted, with the current law governing the "public use" limitation at the federal level) in support of the County's proposal. And considering the extensive briefing on behalf of all sides and interests to the discussion, it seems pointless merely to rearrange and repeat those still-relevant authorities in any event. This brief, submitted on behalf of the Public Corporation Section of the State Bar of Michigan (the "Section"), will therefore focus the Court's attention on issues and considerations not addressed by the submissions of the parties and other *amici*.[2]

The Section has a varied membership, open to all members of the Bar, but its active participants tend to represent Michigan governmental entities—counties, cities, villages, townships, state agencies, and school districts. These entities all have eminent domain authority to one extent or another, and Section members and their clients thus have a significant stake in the language or "test" by which the Court pronounces the outcome of this case. The briefs filed in support of the property owners exhort the Court to "overturn" Poletown; in their zeal to reach that goal, however, they offer no realistic alternative analysis to replace it. The Section asks that the Court take the "long view" here and establish a clear and workable "public use" doctrine for application by the lower courts through a discussion that includes a thorough analysis of the scope and application of that

[1] Nader, "Making Eminent Domain Humane," 49 Vill. L. Rev. 207 (2004)

[2] It should be noted that this brief is filed on behalf of the Public Corporation Section only. It does not reflect the views or opinions of the State Bar of Michigan, and has not been authorized by the State Bar of Michigan.

limitation to the everyday workings of affected governmental entities.

Most of the governmental entities represented by Section members do not have a steady diet of the kind of economic development projects now under review. They exercise the right of eminent domain in more traditional ways and for more typical public purposes—building, improving, and repairing roads; extending sanitary sewers and water mains; constructing storm drainage systems. Occasionally, they condemn properties to relieve the public health, safety, and welfare of blighted buildings or areas, or use the zoning powers granted by the legislature to remove "nonconforming" uses or structures that have become nuisances over time. See, e.g., MCL 125.583a; MSA 5.2933(1) (City and Village Zoning Act); MCL 125.286; MSA 5.2963(16) (Township Rural Zoning Act).

This is not to say that the economic development objectives of many communities, or of the County in this case, are unusual or inappropriate in any way; to the contrary, given the need for competition in national (indeed, world) markets, those activities are vitally important, as recognized in several comprehensive legislative enactments encouraging economic development for the viability of the state. See, e.g., the Economic Development Corporation Act, MCL 125.1601, *et seq.*; MSA 5.3520(1), *et seq.* But the vast majority of eminent domain cases do ***not*** involve property taken by a governmental agency for transfer to a private third party. How the Court's opinion in this case is seen to affect those more traditional uses of the eminent domain authority, then, is every bit as important as the specific outcome determined by the Court with regard to condemnation for economic development purposes.

The governmental entities represented by Section members would fully expect this Court to begin any discussion of the taking authority with an affirmation of the importance of private property rights; they recognize as well as anyone the ways in which private property ownership drives the engine of even local economies. Property rights are not inviolate, though, and never have

been. Subject to "public use," "necessity," and "just compensation" requirements, both the federal and state constitutions authorize the exercise of eminent domain as a legitimate means of promoting and protecting the public interest. Whatever else the Court's opinion addresses, the Section urges the Court to expressly recognize in its opinion the legitimate use of the taking authority for public improvements or facilities used by, or available for use by, the public at large.

More specifically, it is critical that the Court's opinion identify those things that are indisputably public uses when in the hands of (or available to) the public—roads, sewers, storm drains, utilities, and the like. Until recently, this conclusion seemed obvious. But decisions such as the recently published Court of Appeals opinion in City of Novi v Adell Children's Trust, 253 Mich App 330; 659 NW2d 615 (2002), holding that a road proposed to be constructed, owned, and maintained by the City, and open to the public at all times, was not a "public use," have muddied previously clear waters. In Adell, the Court found that because only a couple of properties (large, industrial uses with significant numbers of employees, vendors, and other visitors) were likely to make frequent use of the road, it was "predominantly" for the private benefit of those properties. In so holding, the Court of Appeals completely ignored the fact that the new road would have eliminated a concededly dangerous curb cut onto a major thoroughfare. More significantly, it ignored the fact that in many cases where the exercise of eminent domain authority has been historically authorized there are significant benefits conferred on specific, identifiable properties.

For some kinds of improvements where eminent domain is unavoidable, such as road widenings and sanitary sewer and water extensions, the local governmental agency is actually ***required*** to prove that such properties will receive a benefit greater than that inuring to the public as a whole, particularly if the agency seeks to have that property bear some or all of the cost of the improvement (as in the case, for example, of special assessments against those properties as

permitted by law). To avoid the costly and docket-choking challenges that will surely result otherwise, it is critical to clarify that such publicly owned and controlled improvements will continue, as they have historically, to constitute public uses.

The Court should also affirm the traditional use of the taking authority for blight and nuisance reduction. Both dissenting Justices in Poletown acknowledged the legitimacy of the use of eminent domain for these kinds of purposes, even though the property acquired is often eventually transferred to third parties (generally through a public bidding or other neutral process). Referring to the long history in Michigan allowing condemnation for slum and blight clearance, both reasoned that the "controlling" purpose of such takings was not to benefit third parties but to accomplish the removal of the offending condition. Condemnation for these purposes is typically a "last resort," but the authority to take property to address these recognized public health, safety, and welfare concerns must be expressly recognized in this Court's opinion in this case.

The Section acknowledges, however, that if property is proposed and intended at the time of the taking to be transferred to a ***specific*** third party, greater scrutiny by the Court into the nature of the public benefit is appropriate. The kind of inquiry a court might make in the case of an intended transfer could easily start with the analysis found in Justice Ryan's dissent in Poletown, where he addressed the general characteristics of a permissible taking "for" a particular third party: Is the public need for the property particularly important? Will the private entity to whom the property is transferred be required to make and keep the property available to the public? Was there a public choice made to take the property, as opposed to a private demand? Poletown, supra, at 674. Justice Ryan's analysis of this "transfer" issue, however, expressly acknowledges that the singular fact that the property will not be retained by the condemning authority does not preclude a finding that the taking still primarily benefits the public.

Keeping within the traditional function of an *amicus*, which is to draw to the Court's attention to matters that might otherwise escape the Court's analysis, this brief focuses on the need for clear guidance as to what public uses are ***not*** up for debate, and seeks confirmation, in light of recent cases, that the legitimate and traditional exercises of eminent domain by the public corporations of this state will be permitted to continue to promote and protect the public interest through the exercise of eminent domain in appropriate situations. The significance of the Court's opinion to the conduct and function of the communities of this state in the performance of their most basic obligations cannot be overstated.

ARGUMENT

I.

THE COUNTY HAS THE AUTHORITY TO TAKE DEFENDANTS' PROPERTY IF IT IS BEING TAKEN FOR A PUBLIC USE.

This Court's order granting leave to appeal directed the parties to brief the initial question "whether plaintiff has the authority, pursuant to MCL 213.23 or otherwise, to take defendants' properties." The fact the Court framed this as a separate question from the Court's next stated issue, which asks "whether the proposed takings, which are at least partly intended to result in later transfer to private entities, are for a 'public purpose,' pursuant to Poletown," is problematic, because from the Section's point of view the answer to the first question depends on the answer to the second question. Put simply, if the taking here at issue is for a "public use" as required under the state and federal constitutions, then the County has the authority to take the properties.

MCL 213.23; MSA 8.13 is a general authorization granted to public corporations to take property for certain purposes:

> Any public corporation or state agency is ***authorized*** to take private property necessary **[1]** for a public improvement or **[2]** for the

> purposes of its incorporation or [3] for public purposes within the scope of its powers for the use or benefit of the public and to institute and prosecute proceedings for that purpose. (Bracketed numbers and emphasis added.)

The County apparently conceded below that the "public improvement" and "purposes of its incorporation" provisions are not at issue here, and that it relies on the language authorizing takings necessary "for public purposes within the scope of its powers." The County also apparently conceded below that, in order to rely upon this statutory provision, it must establish that the property is being taken "for the use and benefit of the public."

Mich. Const. 1963, art. 7, § 1 establishes counties as bodies corporate "with powers and immunities provided by law." Art. 7, § 2 of the constitution provides broad authority for counties to adopt charters establishing powers and limitations on those powers:

> Subject to the law, a county charter may authorize the county through its regularly constituted authority to adopt resolutions and ordinances relating to its concerns.

Art. 7, § 2 was new to the state constitution in 1963, and according to the "Convention Comment" formally appended to the provision for review by the voters was intended to establish a system of "home rule" for counties on a par with that which already existed for cities and villages.

The Charter County Act, MCL 45.501 *et seq*; MSA 5.302(1) *et seq*, establishes the requirements for the adoption of a charter, including "mandatory" and "permissible" charter provisions. The permissible charter provisions are set forth at MCL 45.515; MSA 5.302(15) and include:

> (c) * * * The authority to perform at the county level any function or service not prohibited by law, which shall include, by way of enumeration and not limitation: police protection, fire protection, planning, zoning, education, health, ***welfare***, recreation, water, sewer, waste disposal, transportation, abatement of air and water pollution, civil defense, and ***any other function or service necessary or beneficial to the public***

> ***health, safety, and general welfare of the county***. (Emphasis added.)

The Charter County Act does not completely supplant the existing authority of counties to undertake their public corporate powers. Under MCL 45.514(g); MSA 5.302(14)(g), "the general statutes and local acts of this state regarding counties and county officers shall continue in effect except to the extent this act permits the charter to provide otherwise, if the charter does in fact provide otherwise."

One of the more significant aspects of the 1963 state constitution was the inclusion, for the first time, of a general but emphatic provision intended to confirm that the constitutional and statutory powers accorded local governments are to be ***liberally construed*** in their favor:

> The provisions of this constitution and law concerning counties, townships, cities, and villages shall be ***liberally construed*** in their favor. Powers granted to counties and townships by this constitution and by law shall include those ***fairly implied and not prohibited*** by this constitution. (Emphasis added.)

The Convention Comment to this provision indicates that it is "intended to ***direct the courts*** to give liberal or broad construction to statutes and constitutional provisions concerning all local governments." The Comment also notes that the purpose of §34 was to "extend to counties and townships within the powers granted to them equivalent latitude in the interpretation of the constitution and statutes" as that enjoyed by home rule cities and villages.

In light of the broad purpose and language of §34, it would be inappropriate (not to mention anti-climatic) for the Court to conclude that it need not reach the constitutional question whether the taking here fits the definition of "public use" because the County lacks the statutory authority to take the property for the purposes asserted. The Court should be guided in this inquiry by its recent decision in Adams Outdoor Advertising, Inc v City of Holland, 463 Mich 673; 625 NW2d 377 (2001), in which it broadly described the powers of all local units of government in Michigan by

stating, "our municipal government system has matured into one of general grant of rights and powers, subject only to certain enumerated restrictions instead of the earlier method of granting enumerated rights and powers definitely and specifically."

The property owners' reliance on this Court's decision in City of Lansing v Edward Rose Realty, Inc, 442 Mich 626; 502 NW2d 638 (1993), for the proposition that the power to condemn property cannot be "located in" a general power such as the home rule provisions of the constitution and state statute, seems misguided. Edward Rose did not focus on the corporate authority of the city to condemn access for cable lines. Rather, because it could not find any direct reference to "cable lines" in MCL 213.23; MSA 8.13, the Court in that case focused on whether there existed any authority ***elsewhere*** in the general statutes or constitution of the state that would support a finding as a public use or purpose the mandatory access onto private property by a city franchise cable television provider. While the Court ultimately found that, under Poletown, the interests of the cable company predominated over those of the city, and that therefore the taking was not for a public use or public purpose, the Court did still make that detailed inquiry, just as this Court should make it in this case.

To the extent the Court's inquiry in this first issue can be seen as asking whether the County has the corporate or statutory authority to take the Defendants' property under these circumstances, a final insight is provided by the oft-quoted dissent of Justice Holmes in Tyson & Brothers v Banton, 273 US 418, 445-446; 47 SCt 426 (1927):

> We fear to grant power and are unwilling to recognize it when it exists. * * * [W]hen legislatures are held to be authorized to do anything considerably affecting public welfare it is covered by apologetic phrases like the police power, or the statement that the business concerned has been dedicated to a public use.
>
> * * *

> I do not believe in such apologies. I think the proper course is to recognize that a . . . legislature can do whatever it sees fit to do unless it is restrained by some express prohibition in the Constitution of the United States or of the State, and that courts should be careful not to extend such prohibitions beyond their obvious meaning by reading into them conceptions of public policy that the particular court may happen to entertain.

The public use issue is properly joined in this case, and the Court should not avoid it by a narrow interpretation of county authority as compared to that of other local governments.

II.

IF POLETOWN IS REVERSED OR RESTATED, THE COURT'S OPINION MUST CLEARLY CONFIRM THE VALIDITY AND SCOPE OF THE EMINENT DOMAIN AUTHORITY AS TO TYPICAL PUBLIC IMPROVEMENTS AND BLIGHT OR NUISANCE REMOVAL.

Much of the criticism of Poletown over the years has been directed less to the "public purpose" aspect of the test that it announces than to the ***application*** of that test. As noted above, the Poletown analysis is generally considered to be in line with the federal precedent that clearly influenced it; it is the breathtaking scope of the project and the sheer size and effect of the taking that have drawn attention to it. It has hardly led, however, to a wholesale transfer of private lands to other, more favored private owners. In fact, most of the reported cases decided under the Poletown analysis have used its analysis ***to prevent*** proposed takings. See, e.g., Tolksdorf v Griffith, 464 Mich 1; 626 NW2d 163 (2001); City of Centerline v Chmelko, 164 Mich App 251; 416 NW2d 401 (1987); Edward Rose, supra; Adell, supra.

As far as the "validity" of the test itself is concerned, it is telling that none of the briefs submitted on behalf of the property owners, including the *amicus* briefs, do much more than argue that Poletown should be overturned; they fail to offer assistance to the Court for the provision of

guidance on future matters that will be crucial in order to avoid similar issues from frequently visiting the Court of Appeals, and ultimately this Court.

A. Defining the Public Use "Problem"

Displaying the canny good sense of a frequent visitor to this Court, the brief for the property owners goes to great lengths to frame its approach as a "textualist" one. As with many constitutional issues, though, one of the difficulties with a textualist approach in this case is the minimal "text" (here, a two-word phrase) available to interpret. Chief Justice Marshall in McCullough v Maryland, 17 US 316, 407; 4 LEd 579 (1819), framed this typical problem as follows:

> A constitution, to contain an accurate detail of all the subdivisions of which its great powers will admit, and of all the means by which they may be carried into execution, would partake of the prolixity of a legal code, and could scarcely be embraced by the human mind. It would never be understood by the public. Its nature, therefore, requires that only its great outline should be marked, its important objects designated, and the minor ingredients which compose those objects be deduced from the nature of the objects themselves.

Justice Scalia has made the point that "in textual interpretation, context is everything, and the context of the constitution tells us not to expect nitpicking detail, and to give words and phrases an expansive rather than narrow interpretation—though not an interpretation that the language will not bear." Scalia, A Matter of Interpretation: Federal Courts and the Law (Princeton University Press, 1997), p 37.[3]

In support of its textualist approach, the property owners' brief uses Madison's comments in The Federalist, Locke's Second Treatise on Government, and even the comments of Gouveneur Morris to the Pennsylvania assembly in 1785, to construct a general thesis of property as a right fundamental to individual liberty and to our system of government. The brief then quickly converts

[3] This admonition by Justice Scalia echoes the provisions of Const. 1963, art. 7, § 34, which provides that "the provisions of this constitution and law concerning counties, townships, cities, and villages shall be liberally construed in their favor."

that thesis into a claim that the "public use" limitation requires some kind of "actual use" by the public; it then contrasts this narrow view with the broader idea of "public advantage" or "public benefit" described in Berman, supra.

To the extent the Court finds it useful to consider these two separate views of the limitation, a good statement of the difference between the two is found in 1 Lewis, A Treatise on the Law of Eminent Domain in the United States (3rd ed., 1909), §257:

> The different views which have been taken of the words 'public use' resolve themselves into two classes: ***one holding that there must be a use or right of use on the part of the public or some limited portion of it, the other holding that they are equivalent to public benefit, utility or advantage.*** Some of the many definitions of the words public use are here given. The words 'public use' mean public utility, advantage or what is productive of public benefit.
>
> 'If the public interest can be in any way promoted by the taking of private property, it must rest in the wisdom of the legislature to determine whether the benefit to the public will be of sufficient importance to render it expedient for them to exercise the right of eminent domain, and to authorize an interference with the private rights of individuals for that purpose.' 'By the public use is meant for the use of many, or where the public is interested.' 'Whatever is beneficially employed for the community is of public use and a distinction cannot be tolerated.'
>
> Similar definitions, making the words equivalent to public benefit or advantage, are numerous. On the other hand, numerous cases hold that to constitute a public use the property must be taken into the direct control of the public or of public agencies, or the public must have the right to use in some way the property appropriated.

Given this historical viewpoint, it would seem that the context of the term "public use" does not clearly and unequivocally support a limited "actual use" definition. In fact, considerable scholarship has been directed at establishing just the opposite conclusion—that the broader "public benefit" school probably prevailed at the time the term "public use" was inserted into the state and

federal constitutions.[4] Suffice it to say that, even from a "textualist" viewpoint, for every reference by Madison to individual rights, a reminder can be found in the writings of the time that the whole point of protecting such rights is to further the good of the public as a whole, which "comprehends all and every individual."[5] And for every reference by Locke to the necessity of private property to legitimate government there is another by Burke (or some contemporary of equal stature) explaining that the purpose of government is still to secure the "general good, resulting from the general reason of the whole" through their chosen representatives.[6]

The U.S. Supreme Court, construing the exact same term, announced itself for the broader "public benefit" test in 1954 in Berman v Parker, supra. In Berman, the Supreme Court upheld the taking of private property for immediate transfer to another private property owner for purposes of slum clearance, finding that Congress had specifically authorized the taking of property for urban revitalization and had explicitly determined that urban revitalization was a public purpose. According to the Berman Court, "It is within the power of the legislature to determine that the community should be beautiful as well as healthy, spacious as well as clean, well-balanced as well as carefully-patrolled....If those who govern the District of Columbia decide that the Nation's Capital should be beautiful as well as sanitary, there is nothing in the Fifth Amendment that stands in the way." Berman, supra, at 34. When the legislature speaks, Berman reasoned, "the public interest has been declared in terms well-nigh conclusive." Id. at 32.

The Supreme Court affirmed its Berman analysis in Hawaii Housing Authority v Midkiff,

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[4] See, e.g., Melton, "Eminent Domain, Public Use, and the Conundrum of Original Intent," 36 Nat. Res. J 59 (1996) ("In general terms, however, the doctrine has developed in conjunction with this trend is consistent with the original American concept, which appeared in colonial, revolutionary, and early national days, that while 'public use' was necessary, 'public use' actually mean public benefit—of almost any conceivable kind"). See also, Berger, "The Public Use Requirement in Eminent Domain," 57 O.L.Rev. 203 (1978).

[5] 3 John Adams, A Defense of the Constitutions of Government of the United States of America (1788) p. 160.

[6] Edmund Burke, Speech to the Electors of Bristol (1774), in Burke's Speeches and Letters on American Affairs (Everyman's Library ed., 1908), p 73.

461 US 229; 104 S CT 2321; 71 LEd 2d 186 (1984), in which it considered the validity of a Hawaiian state law allowing the state to take land from lessors and transfer it to lessees. At the time of the enactment, the Hawaiian legislature had determined that 72 private individuals owned approximately half of the state's land, while the federal and state governments owned nearly all of what remained. The Midkiff Court upheld the takings, finding that "where the exercise of the eminent domain power is rationally related to a conceivable public purpose, the Court has never held a compensated taking to be proscribed by the public use clause." Id. at 241. As a reviewing court, the Supreme Court held, it "will not substitute its judgment for a legislature's judgment as to what constitutes a public use 'unless the use be palpably without reasonable foundation.'" Id. Midkiff left no doubt where the U.S. Supreme Court stood on the issue, stating that the public use is "coterminous with the scope of the state's police power," and that deference to the legislative body's public use determination is required "until it is shown to involve an impossibility." Id.

Poletown is not unclaimed; it is the clear progeny of Berman. While the property owners correctly suggest that the term "public use" as used in the ***state*** constitution need not necessarily be defined in the same manner as it is for purposes of the federal constitution (as that document is applied by the federal courts) it is somewhat awkward to make that argument, as neither the text nor context of the Michigan Constitution seems demonstrably different with regard to what was intended by the use of that term. See, e.g., Doe v DSS, 439 Mich 650, 67-71; 487 NW2d 166 (1992).

The property owners' brief also cites approvingly several times to Michigan Supreme Court Justice Thomas M. Cooley's Treatise on the Constitutional Limitations Which Rest Upon the Legislative Power of the American Union (5th ed., 1883). The Cooley treatise does generally argue that the right of eminent domain implies that the purpose for which it may be exercised must be public:

> . . . It is conceded on all hands that the legislature has no power, in any case, to take the property of one individual and pass it over to another without reference to some use to which it is to be applied for the public benefit. 'The right of eminent domain,' it has been said, 'does not imply a right in the sovereign power to take the property of one citizens and transfer it to another, even for a full compensation, where the public interest will in no way be promoted by the transfer.'

Cooley, p 657. But even Cooley found an exact definition of public use to be difficult:

> We find ourselves somewhat at sea, however, when we undertake to define, in light of the judicial decisions, what constitutes a public use.
>
> * * *
>
> "It must be conceded that the term 'public use,' as employed in the law of eminent domain, has a meaning much controlled by the necessity, and somewhat different from that which it bears generally."

Id. at 659 and 665.

The discussion of the meaning of public use in 2004 is no easier than it was in 1883, in part because the concept has never been particularly constant. This Court's discussion of the meaning of the term "public use" must be guided by the modern realities and practicalities of governance.

B. General Principles Governing the Exercise of Eminent Domain

There are some "common denominator" principles available to assist this Court's discussion of the current status of the public use limitation. Taken together they can perhaps foster an analysis of eminent domain authority that the lower courts will find helpful.

1. Private property rights are important, but not inviolate, and government may take private property so long as it is taken for public use and just compensation is paid for it.

The property owners' brief recites the whole catechism of the current property rights theorists, from Blackstone to Locke to Madison, all the way through Scalia. Those esteemed authorities stand for the proposition that the protection of property rights is, under our constitutional form of government, necessary for the preservation of individual liberty. We all agree that the right

of private property owners to be free from unnecessary and unjustified interference by the government is beyond question. But as Justice Holmes famously said, "Government could hardly go on if to some extent values incident to property could not be diminished without paying for every such change in the general law." Pennsylvania Coal Co. v. Mahon, 260 U.S. 393, 413 (1922),

None of these authorities, however, suggest that private property cannot be regulated or even taken by the government for appropriate uses. The Cooley treatise alone cites scores of cases that confirmed that right well over a hundred years ago. From colonial times, the use of eminent domain has been contemplated for the establishment of public improvements such as roads, utilities, and government buildings, and even for such privately held improvements as grist mills, railroads, canals, and toll roads; indeed, the use of that authority drove the very development of the country, which in turn drove the development of the law of public use: "No branch of constitutional law has felt the effect of the mechanical and industrial progress of the last 100 years more than that relating to eminent domain." 1 Nichols, The Law of Eminent Domain (2nd ed. 1917), pp 134-135.

2. *The legislature determines what constitutes a public use, subject to limited review by the judiciary.*

The public use limitation is a constitutional standard, and as such in the last analysis its application to any particular taking will be for the court. See, e.g., Lakehead Pipe Line Co. v Dehn, 340 Mich 25, 39-40; 64 NW2d 903 (1954); Shizas v City of Detroit, 333 Mich 44; 52 NW2d 589 (1952). But there must always be a legislative determination of when to invoke eminent domain authority and to engage in a project or activity that undertakes the use of that property in the interest of the public health, safety, and welfare. Because it is a legislative function, and has important budgetary implications, lawmakers at every level of government are necessarily given wide discretion in determining when to take property and for what purpose.

The U.S. Supreme Court in Berman described an unabashedly liberal form of judicial deference when it stated that a determination by a legislature to take property constitutes a determination of public purpose that is "well nigh conclusive." Berman at 32. Both the majority and the dissent in Poletown struggled with the concept of just how much deference to legislators is appropriate, and the relationship of such deference to the constitutional role of the courts. The majority cited Gregory Marina v City of Detroit, 378 Mich 393; 144 NW2d 503 (1966), for the general proposition that what constitutes a public purpose is primarily legislative, subject to review only for abuse. Poletown at 632. Justice Ryan's dissent criticized the reference to Gregory Marina on the grounds that it was a taxation case, not an eminent domain case. Id. at 667.

One last reference to the Cooley treatise is helpful in light of the reliance on that text by both the property owners here and the Poletown dissenters. While Cooley states that "the question what is a public use is always one of law," he also acknowledges that "deference will be paid to the legislative judgment." Cooley at 666. Elsewhere in the treatise, he offers some additional insight into what deference to legislative findings generally means in practice and theory:

> ***But what is for the public good, and what are public purposes, and what does properly constitute a public burden, are questions which the legislature must decide upon in its own judgment, and in respect to which it is vested with a large discretion which cannot be controlled by the courts***, except, perhaps, where its action is clearly evasive, and where, under pretense of a lawful authority it has assumed to exercise one that is unlawful. Where the power which is exercised is legislative in its character, the courts can enforce only those limitations which the constitution imposes; ***not those implied restrictions which, resting in theory only, the people have been satisfied to leave to the judgment, patriotism, and sense of justice of their representatives.*** (Emphasis added.)

Id., at 155. The question of what constitutes a public use is ultimately judicial because it is a constitutional limitation. But as shown below, the courts have historically and for good reason, been loathe to interfere with legislative determinations of the public good.

3. *Where the property will be put to actual use by the public, or will be available for use by the public, the "public use" limitation is not implicated.*

There are some exercises of the eminent domain authority as to which the question of public use is not reasonably open to debate, and where the court therefore need not tread long. The building of roads and highways; the laying of sanitary sewer and water pipes; the establishment of storm drainage improvements—these are public works and public improvement projects where the property acquired is put to clear public health, safety, and welfare uses, and is typically (though not always) owned and controlled by the public. These are clear and obvious public uses and the Section prays that the Court will identify them as such.

(a) *"Public Use" v "Public Necessity"*

This is not to say that a court can conduct no review of the determination of a legislative body to undertake these kinds of improvements. They are reviewable, for example, to determine whether they are matters of "public necessity." The term "public necessity" is critically different from the term "public use." Take the example of a public roadway laid across an individual's property, acquired and constructed using the funds of a municipality, built to public road standards, and owned and maintained by the municipality. By any traditional definition, the road is a public use. While the property owner may seek judicial review of the municipality's decision to build the road, the review is of a limited sort.

Under both case law and the statute governing the exercise of eminent domain in Michigan, the Uniform Condemnation Procedures Act (UCPA), MCL 213.51; MSA 8.265(1), the necessity of the project itself—the need for the road, in this example—is not subject to judicial review, and a court should not substitute its judgment for that of the municipality in deciding whether the project is useful or a good idea. Necessity in this review is parcel-specific, and concerns only the question whether the municipality in fact needs some or all of the property in order for it to undertake the

particular project. See, State Highway Commission v VanderKoot, 392 Mich 159, 175-177; 220 NW2d 416 (1974). Justice Ryan discussed with clear acceptance this fundamental difference between "public use" (a ***legal*** question addressing whether eminent domain can be employed at all) and "public necessity" (a ***fact*** question concerning the need to condemn particular land) in his Poletown dissent. Id. at 675, n21, citing Ryerson v Brown, 35 Mich 333 (1877).

The vast majority of the exercises of eminent domain fall within the public improvement scenario. Any discussion of the public use limitation on the exercise of eminent domain, the Section submits, must be mindful of that fact, and should expressly clarify the limited nature of the review given to such public improvement projects. To do otherwise will invite property owners to challenge "public use" in cases merely to delay the process in the hopes of securing an offer in excess of the fair market value. Ambiguity on this issue would provide leverage for such challenges, with the sole objective of achieving a windfall. Failure to be clear on the issue may also lead courts to simply substitute their own judgments about whether a public improvement shall be made.

The Adell case is a good example of the failure to distinguish between public *use* and public *necessity*. Adell involved a determination by the City of Novi to construct a "ring" or bypass road around a major intersection that, in the opinion of the City and the Road Commission, would have alleviated an unsafe traffic condition. A shared curb cut onto a main thoroughfare for two properties was to be closed, and a new roadway access to those properties was to be built by the city, owned by the city, and maintained by the city, and was to be open to any member of the public who determined to go on it—including the many employees, suppliers, business invitees, and the like whose visit to the two adjoining businesses on a daily basis would be demonstrably safer.

The Court of Appeals in Adell found that the roadway would not be a "public use," because it only served two properties, and those two properties therefore had the "predominant" interest in

the road. The Court ignored the fact that the new roadway would eliminate a conceded traffic safety hazard on a major thoroughfare. Its decision was made in the face of case law and treatises throughout the country establishing that the public ownership and control of the roadway, and its availability for actual use by the public, was sufficient to satisfy the public use requirement even if it served only one individual or property owner. See generally, Detroit International Bridge Co. v American Seed Co., 249 Mich 289; 228 NW 791 (1930); 1 Lewis, supra, at §259; 2A Nichols, The Law of Eminent Domain, 3rd Ed 1978, at §703(4) and 703(5).

The Adell Trusts have filed an amicus brief in this case taking the position that a detailed public use inquiry needs to be made by a reviewing court whenever any specific or identifiable property directly "benefits" from the exercise of eminent domain authority even where the governmental agency retains all ownership and control of the property. (Adell brief, pp 18-21.) That would presumably include the situation described above, where the property taken would be put to a use (such as a road) that would be owned, controlled, and maintained by the public, but would serve only a few individuals or properties. The implications of a rule requiring a court to "heighten" its scrutiny and "weigh" the public interest in every such improvement against its private benefit are enormous. It would quickly and effectively eliminate the UCPA "quick take" concept under which title to the needed property is secured in relatively short order, leaving only the issue of just compensation as the issue for more prolonged litigation if agreement can't be reached. It would also install the trial courts of this state as the primary decision makers on the relative merits and public benefits to be secured by just about any public improvement project (e.g., an extension of a public sewer to serve two or three homes).

(b) Public Improvements Regularly Benefit Private Properties

The main problem with the idea that a "greater" level of scrutiny should occur where a public improvement results in a "benefit" to a private property owner is that virtually ***every*** exercise of eminent domain authority for recognized public uses—roads, sewer and water lines, storm drain improvements, etc.—confers a specific benefit on readily identifiable property owners in a way that is often more obvious than the benefits to the public generally. A sewer or water line extension is a typical situation. The immediate assistance to the properties connecting to it is typically more apparent than the general benefit to the public of clean soils, a properly looped and pressurized water system, or the general public health.

Some of the entities represented by Section members are currently experiencing unprecedented growth, while others are dealing with an aging stock of homes and other improvements. This combination of growth and deterioration has fueled the need for new infrastructure improvements (e.g., roads, sewers, storm drains, other utilities) in one place and other public improvements (e.g., clearance of abandoned or slum areas) in another. The need for clear rules allowing for governmental action and consistent with traditional and practical history is imperative.

Pushing against municipalities in the other direction are obligations imposed by varied forces that not only compete for ever-diminishing local funds, but require actual public improvements that sometimes benefit specific individuals. A good example are the state and federal "clean water" statutes requiring the elimination of pollution sources that might work their way into public waters. See, e.g., 33 USC §1251, *et seq.*; MCL 324.3101, *et seq.*; MSA 13A3101, *et seq.* Complying with these regulations requires a combination of physical improvements, including sanitary sewerage systems and storm water control facilities, which communities often accomplish at the time specific developments are proposed and constructed.

Sometimes developers pay for, construct, and then convey over to municipalities these systems; sometimes they are constructed by the municipality with the cost charged back to the property owner. Occasionally, rights-of-way or easements are needed for these improvements. But in all cases, in order to impose these costs or require these improvements, a specific benefit, measured in terms of a proportionate increase in value to a specific private property or development project will exist—and ***must*** exist. Dixon Road Group v City of Novi, 426 Mich 390; 395 NW2d 211 (1986); Kuick v Grand Rapids, 200 Mich 582; 160 NW 979 (1918).

The point of this is to bring to the Court's attention, as it formulates its discussion of what constitutes a "public use," the unavoidable fact that traditional exercises of authority may actually mandate the presence of private benefit. The outcome of the present case cannot obscure the exercise of other legitimate authority in connection with which there is typically an element of benefit to specific and identifiable private property even in the most obvious of public situations. See also, 2A Nichols, supra, at 7.03[5][b] ("incidental private advantage to neighboring lands does not render a condemnation invalid.")

(c) Separation of Powers Considerations

The other apparent flaw in an approach that does not firmly describe publicly owned and controlled uses as falling within the scope of "public use," no matter how many (or few) they serve, is that it would establish the courts as the final arbiter of what roads should be built, what sewer and water lines should be laid, and when storm drain improvements need to be made. This would be repugnant to the concept of local self-government. Specific to the concept of public use is the recognition that it is the local officials that, as a practical matter, have the best idea of what the public good demands:

> Since our country was conceived in the theory of local self-government, political power has, from the beginning, been exercised

> by citizens of the various local communities. ***Having been so dedicated by long practice, local self-government has come to be regarded as the most important feature in our system.*** The American people have always acted upon the deep-seated conviction that local matters can be better regulated by the people of the locality than by the state or central authority. One controlling idea of local self-government is to bring the officials nearer to the people whose interests are immediately affected by official conduct. . . . ***Local self government is, thus, a guaranty of individual liberty.*** Further, local self-government better insures that the public will not lose interest in their government. When the public does lose interest in the government, they run the risk of having their government lose interest in them. Thus, local self-government is a way of insuring individual liberty through an alert citizenry. (Emphasis added.)

McQuillan, Municipal Corporations, 3rd Ed (Rev) § 1.37, pp 44-46.

Michigan has not abandoned its belief and participation in republican government, and in fact has a long history supporting the concept of the separation of powers as between the legislative and judicial branches. As this Court stated in O'Donnell v State Farm Mut. Ins. Co., 404 Mich 524, 542; 273 NW2d 829 (1979), "The responsibility for drawing lines in a society as complex as ours, of identifying priorities, weighing the relevant considerations, and choosing between competing alternatives is the legislature's, not the judiciary's."

The Court must make sure that its discussion of the public use limitation does not result in the trial courts of this state regularly conducting hearings and weighing the benefits of each and every municipal public infrastructure or improvement project. Locally-elected officials who are close to their constituencies need to determine when and where public infrastructure will be placed. Sometimes those decisions will confer clear and substantial benefits on specific, identifiable individuals.

C. Special Considerations In the Case of Transfers to Third Parties

Only when the property taken is not retained by the governmental agency exercising eminent domain authority does the question of public use truly become an issue. It is not possible for the

Section to accomplish in these short few pages what treatise writers of the stature of Cooley, Nichols, and Lewis, and learned judges have struggled with. And they have struggled largely because of the fact that eminent domain has been exercised historically not just on behalf of non-governmental entities and private corporations, but even sometimes ***in the name of*** such entities, without objection or opposition from courts construing the public use requirement from the earliest days of the republic.

There is an occasional temptation in the law (and elsewhere) to "reinvent the wheel." In this case, though, the Section suggests that a framework for analysis of the present issue already exists, in the Poletown case itself. Both of the Poletown dissenters acknowledge that condemnation of property for transfer to private corporations "is not wholly proscribed." (Ryan, J. at 670.) Justice Ryan characterizes such an exercise of the eminent domain authority as "an exception," which he terms the "instrumentality of commerce exception." Id. at 672. He acknowledges that eminent domain may be employed even where it is the ultimate intention to turn the property over to a third party, so long as the intention to benefit the third party is not the "controlling purpose." His opinion explicitly accepts the propriety of blight removal or "slum clearance" cases, in which property is condemned and cleared and then ultimately conveyed to some other entity for use. He acknowledges that the "controlling purpose" of the acquisition is in those cases the clearing or the removal of the nuisance, rather than the conferring of a benefit on the party ultimately receiving the property. Id. at 674.

Ryan contrasts that with the idea of condemning land "***for*** a private corporation, which he argues can only be done under the instrumentality of commerce "exception" to the "public use" limitation. This exception, he argues, is strictly limited. It has three elements: (1) public necessity

of the extreme sort otherwise impracticable; (2) continuing accountability of the public; and (3) facts establishing independent public significance.

It is implicit in the acknowledgment by all sides to the issue here that the use of the condemnation power "for" transfer to third parties must of necessity be limited, or the exception will tend to swallow the rule. Other factors may certainly be considered and appended to this formulation, or it may change somewhat. One continuing theme in the cases and commentaries cited above is that what is seen as constituting the "public good" can change; as a result, and as has happened throughout the history of this country and state, the notion of what will suffice as supporting "public use" might need to be altered as well. The proper decision maker in deciding what constitutes the public good at a given time is the legislative branch.

E. Summary

Although this case raises vitally important issues involving both individual property rights, which demand strong protection, and the most elemental operations of state and local governmental agencies, which define us as a political system, the Court has a good historical road map that, if followed, will lead to a reasonable and constitutionally correct result. Private property can be taken, with just compensation, for public use. Publicly owned and controlled public improvements such as roads, sewers, storm drainage systems are public uses, even though they may benefit identifiable private properties and even if they will realistically be utilized by only a few property owners, are clearly public uses. Because these are historically established governmental functions, legislative determinations to make such improvements should not be interfered with by the courts, except for factual and parcel-specific reviews for necessity.

Condemnation for blight removal and nuisance abatement, historically permitted in Michigan, is also deemed to be for a "public use," because the "controlling purpose" is not the

transfer to a third party but the removal of the illegal condition, and because the property is typically transferred pursuant to some process not specific to any individual or entity (e.g., by a bid process). Takings ***for*** a specific, identifiable private third party merit strict review by the courts, and are permitted only where there is essentially no alternative to accomplishing an otherwise legitimate and substantial public goal.

III.

IF THE COURT OVERTURNS POLETOWN, ITS DECISION SHOULD BE PROSPECTIVE.

The final question that the Court asked the parties to address is whether "a decision overruling Poletown, supra, should apply retroactively or prospectively only, taking into consideration the reasoning in Pohutski v City of Allen Park, 465 Mich 675; 641 NW2d 219 (2002)." Pohutski held that while judicial decisions are typically given "full retroactive effect," in some cases "a more flexible approach is warranted wherein justice might result from full retroactivity." Id at 695. The Court listed four factors to consider in determining whether to apply less than full retroactive effect: (1) the purpose to be served by the new rule; (2) the extent of reliance on the old rule; (3) the effect of retroactivity on the administration of justice; and (4) whether the decision clearly establishes a new principle of law.

Starting out of order with the last factor, it is difficult to predict the Court's opinion in this case and thus impossible to determine whether the decision will "clearly" establish a new public use analysis. Whatever the specifics of the Court's opinion, however, the fact remains that the current "public use" test set forth in Poletown is consistent with the last 50 years of federal jurisprudence involving the interpretation of the same term in the federal constitution. Poletown relied in part on federal precedent, and it seems likely that any opinion that "established a new principle of law" would be doing so on the basis that the text or context of the Michigan Constitution requires a

different result. If not a new principle of law, such a statement would be a significant change in the calculus for takings cases in Michigan.

Continuing to take the factors in Pohutski out of order, the Section notes that, based upon the records of the Michigan Municipal League, it has some 510 member cities and villages. The Michigan Townships Association currently has about 1,235 members. There are 83 counties in the State. All of these entities have the right of eminent domain, which they exercise to a greater or lesser extent and for various purposes. Other entities, like school districts and public utilities, also have limited eminent domain rights.

At any given time, a great number of these entities are planning or programming projects that will include the use of eminent domain. They are purchasing properties—much like Wayne County did in this case—in contemplation of projects and on the assumption that other properties needed for the projects can be acquired through condemnation if necessary. They are incurring costs for the services of land use or facilities planners, design professionals, and real estate or right-of-way specialists. They are doing so with the broad scope of the Poletown decision in mind. They are doing so ***presuming***, as permitted and encouraged under case law (see, e.g., Kropf v Sterling Heights, 391 Mich 139; 215 NW2d 179 [1974]), that statutes such as the Economic Development Corporations Act, MCL 125.1601, *et seq.*; MSA 5.3520(1), *et seq.*; and the Downtown Development Authority Act, MCL 125.1651, *et seq.*; MSA 5.3010(1), *et seq.*, and the provisions of the various zoning enabling acts that permit the condemnation of property to remove non-conforming uses are constitutional. Any decision that alters the course of the application of the "public use" requirement as currently formulated and the various legislation further addressing that must fairly and timely give notice of that change.

All of these local governments are furthering what they believe to be public interests, and they are doing it with the use of public funds—a shrinking resource to say the least. A substantive change in the application of the "public use" requirement would have a correspondingly significant effect on the day-to-day operations of these representative entities. The "flexibility" described in Pohutski ought to be broad enough to permit the Court to consider the interests of the public generally, including the impact of the Court's decision on the public treasuries. This is particularly true if and to the extent the Court's opinion implicates the more traditional or typical exercises of the taking authority for public health, safety, and welfare purposes in the construction and extension of roads, sewers, and other public utilities as the principal and unavoidable, and already expensive, activities of everyday governance.

CONCLUSION AND RELIEF SOUGHT

Since the Poletown opinion in 1981, there have been changes both subtle and significant in the provision of local governmental services. Local agencies have seen their budgets and financial resources shrink, and while proponents of small government might see this as a good thing, there has been no corresponding reduction in the regulatory burdens imposed on those agencies, nor any slowing of the inexorable growth and decay that must be dealt with by those agencies in real dollars and cents every day.

The Public Corporation Section of the State Bar of Michigan sees this case as an opportunity for the Court to clarify the general concepts addressed in Poletown in a way that limits the potential for eminent domain "abuse". But that prospect also raises the possibility of unintentionally arming those who would limit traditional, historical, and even favored exercises of the eminent domain authority. Ambiguity will burden the judicial system with dockets full of "public use" challenges brought solely for delay or to drive up settlement costs in a project, hampering governmental

agencies in carrying out their recognized and unobjected-to obligations with increasingly limited resources.

What is needed is an opinion that confirms that the "public use" limitation is satisfied if the property and improvement will be used, or available for use, by the public, even if specific and identified properties will receive a particular service or benefit, such as a sanitary sewer or roadway extension to only a few homes. If there is a transfer of the property to a third party, the "public use" limitation can still be satisfied if the agency itself or by its direction of others will accomplish some purpose on the property—like the renewal of a blight or nuisance condition—as the controlling purpose or object of the condemnation; in these cases the condemnation will result in a clear and significant public benefit not dependent on the transfer to a third party, which in most events will be by public bid or other objective process.

If, however, the benefit to the public is dependent upon what the third party will do with the property, then some calculus such as that described by Justice Ryan in his Poletown dissent is appropriate—a peculiar importance or public need for the property; an expectation or request that the entity to whom the property is transferred will make and keep the property available to the public; and a public choice made to take the property, as opposed to a private demand.

The issues before the Court go to the very heart of what government does, and who decides what is in, or what furthers, the public interest. Guidance, not the indulgence of theory to the exclusion of practicality, is needed here.

Respectfully submitted,

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